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FEDERAL COMMUNICATIONS COMMISSION
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BEFORE THE
Federal Communications Commission

WASHINGTON, D.C.

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In the Matter of

Implementation of Sections of
the Cable Television Consumer
Protection and Competition Act
of 1992

Rate Regulation

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MM Docket 92-266

**RESPONSE OF TELE-COMMUNICATIONS, INC. TO
VALUEVISION'S SUPPLEMENT TO PETITION FOR RECONSIDERATION**

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**RESPONSE OF TELE-COMMUNICATIONS, INC. TO
VALUEVISION'S SUPPLEMENT TO PETITION FOR RECONSIDERATION**

Tele-Communications, Inc. ("TCI") submits these comments in response to Valuevision's "Supplement to Petition for Reconsideration"¹ filed in the above-captioned proceeding.

INTRODUCTION

On November 23, 1993, ValueVision filed a supplement to its petition for reconsideration of the Commission's Rate Order,² which criticizes the Commission's formula for calculating maximum leased access rates and accuses TCI of evasive leased access

¹ ValueVision Supplement to Petition for Reconsideration filed in MM Docket 92-266, November 23, 1993 ("ValueVision Petition").

² Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd. 5631 (1993) ("Rate Order").

pricing tactics.³ TCI submits this response in order to correct factual inaccuracies regarding TCI practices contained in ValueVision's supplemental petition and to urge the Commission to reject ValueVision's attempt to obtain preferential leased access treatment for home shopping channels.

I. TCI'S METHOD OF COMPUTING MAXIMUM LEASED ACCESS RATES COMPORTS WITH THE COMMISSION'S HIGHEST NET IMPLICIT FEE FORMULA

Based on the Rate Order, TCI established a policy implementing the Commission's "net implicit fee" formula to calculate rates for the three categories of leased access programming established by the Order. Under this formula, a cable system is permitted to charge a home shopping programmer a leased access rate which compensates the cable system for all revenue received from the lost channel, including the per channel retail charge and the per subscriber revenue generated by the highest paying home shopping provider. This model fairly recognizes the value of the channel which the cable system may be forced to relinquish to a leased access provider offering home shopping. The leased access rates quoted by all TCI systems, including the three cited in ValueVision's petition (Vacaville, CA; Boise, ID; and Oakland, NJ), were all computed based on this formula.

ValueVision's assertion that the increase in its rates for carriage resulted from the application of the Commission's rules

³ ValueVision Petition at 5.

is misleading. ValueVision fails to inform the Commission that the prior lower rate was for part-time, fully preemptible carriage. TCI had the right to preempt ValueVision's signal in favor of other programming it deemed more important to its customers and, in fact, such preemption did occur. Thus, a higher rate is not only consistent with the Commission's rules, but is justified by ValueVision's demand for full-time, non-preemptible carriage.

The Commission has adopted rules for resolving leased access disputes. If ValueVision believes it has been wronged by the specific actions of any cable operator, the proper recourse is to follow the Commission's complaint resolution procedures, particularly since there is no evidence that those procedures are inadequate.

Further, TCI strongly objects to ValueVision's erroneous characterization of TCI's leased access rate-setting methodology as an "evasion" of the Commission's rules or an attempt to "'take advantage of' loopholes or unforeseen consequences of Commission regulations."⁴ With respect to ValueVision's specific allegation of evasion, TCI reiterates that it complied with the Commission's regulations in calculating the leased access rate for ValueVision's service. Therefore, on its face, TCI's action cannot be an evasion of those regulations. One cannot comply and evade at the same time. As a general matter, TCI urges the Commission not to encourage every entity seeking a commercial

⁴ ValueVision Petition at 4.

advantage over a cable operator to demand to have the regulations rewritten, or to be given special status under the regulations, simply by reciting the mantra "evasion." Rather, the test should be whether the cable operator's actions are lawful under the Commission's regulations. Any other approach would inject virtually unlimited uncertainty into the cable business and become the breeding ground for meritless, time-consuming, and wasteful attempts to limit cable operator actions that comply with the Commission's regulations.

Moreover, 47 U.S.C. § 532(f) directs the Commission to presume "that the price, terms, and conditions for use of [leased access channels] are reasonable and in good faith unless shown by clear and convincing evidence to the contrary." Despite its sweeping accusation, ValueVision has not cited one instance where TCI has unreasonably calculated its leased access rates. Especially when placed in the context of ValueVision's initial petition for reconsideration, it is apparent that ValueVision's real complaint is with the Commission's leased access rules and all it is accusing TCI of doing is acting within those rules.

II. VALUEVISION'S ASSERTION THAT TCI IMPROPERLY DROPPED ITS PROGRAMMING IS INCORRECT

In addition, ValueVision's suggestion that the Commission's leased access rules prompted TCI to drop ValueVision from four TCI systems⁵ is incorrect. Three of the four TCI systems to which ValueVision advertises (i.e., the TCI systems in Englewood,

⁵ ValueVision Petition at 3.

CO; Thornton, CO; and Denver, CO) were forced to drop certain programmers because of must carry obligations imposed on them by the 1992 Cable Act and the Commission's implementing regulations. ValueVision was selected as one of the programs to be replaced by the must carry signals based on the relative subscriber demand for ValueVision's programming on these systems. The fourth TCI system to which ValueVision's petition alludes is the TCI Buffalo, N.Y., system, which did not drop ValueVision. Rather, ValueVision's carriage arrangement expired and the parties failed to reach a new agreement.

III. VALUEVISION'S PROPOSAL TO CALCULATE MAXIMUM HOME SHOPPING LEASED ACCESS RATES BASED ON 5% OF ACTUAL SALES WILL REDUCE PROGRAM DIVERSITY CONTRARY TO CONGRESSIONAL AND COMMISSION OBJECTIVES

TCI urges the Commission to understand ValueVision's Petition for what it really is: a self-serving attempt to garner preferential leased access treatment for home shopping channels irrespective of the substantial programming diversity problems that such preferential treatment would engender.⁶

As the record amply demonstrates, ValueVision's proposal to replace the Commission's formula with a flat 5% of gross sales to calculate maximum leased access rates in the home shopping

⁶ ValueVision's claim that it cannot afford the new leased access rates, ValueVision Petition for Reconsideration at 10; ValueVision Opposition at 2-3, is remarkable, given the fact that ValueVision's more than \$50 million in cash and debt-free balance sheet have recently enabled it to launch a \$117.5 million bid for National Media Corp. which ValueVision believes will "lead the interactive video shopping marketplace of the future." See CableFAX, January 17, 1994, at 1.

category⁷ would unjustifiably promote home shopping networks' ability to obtain leased access carriage, potentially to the detriment of other would-be lessees, undermining Congress' goal of maximizing program diversity. Parties recognized this fact in their comments in this proceeding. For example, as the Center for Media Education correctly observed:

If current home shopping explicit rates are adopted by the Commission as the basis for leased access charges, there is a strong likelihood that most or all leased channels will be occupied by home shopping networks.⁸

This loss of diversity would be especially likely if the Commission were to adopt ValueVision's incredible suggestion that the maximum leased access rate for home shopping channels should be 5% of the actual sales achieved by the leased access programmer, rather than the dollar amount of revenues received by the cable operator from the home shopping service that supplies the highest fee comparison.⁹ Requiring an operator to lease channel capacity in exchange for 5% of some unknown (and very likely low) sales figure would not only accord an unwarranted leased access preference to home shopping channels, contrary to congressional and Commission diversity goals, but also would

⁷ See Petition for Reconsideration of ValueVision at 4-5.

⁸ Petition for Reconsideration of the Center for Media Education et al. at 8 ("CME"). See also Opposition of Bend Cable et al. at 2-3 (noting that ParCable has used the implicit channel charge methodology successfully in setting leased access rates since 1991); Opposition of CME at 7; Petition for Reconsideration of Continental Cablevision at 31.

⁹ See Reply of ValueVision to Oppositions to Petitions for Reconsideration at 4-5.

require that cable operators effectively act as underwriters to leased access programmers, a result not intended by the section.¹⁰ If a cable system is forced to carry certain programming regardless of subscriber preferences, the cable system should be fully compensated for the loss of that channel. To force a cable system to lease a channel to a home shopping provider for 5% of the provider's highly speculative sales is a naked subsidy to any home shopping programmer who wants to try his hand at cable programming. There is no evidence that Congress believed that home shopping programming was in need of such an extreme subsidy. Indeed, the market has demonstrated that such a subsidy is wholly unwarranted.¹¹

Additionally, in seeking such preferential leased access treatment for home shopping networks, ValueVision's proposal conveniently overlooks the preference already built in to the Commission's leased access scheme by the division of programming into three categories. As the Commission itself has recognized:

[Dividing leased access programming into three categories will] automatically lower the starting point for negotiations for a substantial number of potential programmers who are not in the same programming classification as those paying the highest implicit

¹⁰ See Comments of Home Shopping Network, Inc. on ValueVision's Petition for Reconsideration at 5-6. See also Petition for Reconsideration of Continental Cablevision at 30; Reply of Time Warner to Oppositions to Petitions for Reconsideration at 11.

¹¹ See, e.g., Philip Robinson, "Turn On, Tune In, and Shop From Your Living Room," The Times, October 2, 1993 (Macy's is planning a 24-hour channel with Home Shopping Network, and Time Warner teams up with Spiegel, the second largest U.S. catalogue company, to launch two shopping channels).

fee, and, in some cases the maximum rate per subscriber will be no more than a small portion of the basic service tier fee.¹²

To avoid these undesirable results, TCI urges the Commission to reject ValueVision's petition and to uphold the Commission's highest net implicit fee formula for calculating maximum leased access rates. This formula not only promotes the Act's program diversity objectives, but it also produces rates that "are fair because they are derived from the highest market value of channel capacity for the system."¹³

¹² See Rate Order at ¶ 521.

¹³ Id. at ¶ 519. See also Petition for Reconsideration of Time Warner at 34; Reply of Continental Cablevision to Oppositions to Petitions for Reconsideration at 3.

CONCLUSION

Based on the foregoing, TCI respectfully urges the Commission to reject ValueVision's arguments for reconsideration of the leased access rules. ValueVision has not demonstrated any systemic problem with the rules as promulgated, but rather seeks a grand subsidy of its business. The issues raised by ValueVision have already been considered by the Commission and rejected, for sound public policy reasons, in the Commission's initial analysis and Order. Finally, if ValueVision believes TCI has improperly calculated its leased access rates, the proper recourse is the dispute resolution remedies established in the Commission's rules, not a self-serving effort to have the Commission rewrite the rules in its favor.

Respectfully submitted,



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